

MEMORANDUM

DATE: March 27, 2008

TO: Ms. Sharon L. Summers, DSS
Policy and Program Development Unit

FROM: Daniese McMullin-Powell, Chairperson
State Council for Persons with Disabilities

RE: 11 DE Reg. 1193 [Proposed Fair Hearing Procedure Regulations]

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Health and Social Services/Division of Social Services' (DSS) proposal to amend its fair hearing regulations published as 11 DE Reg. 1193 in the March 1, 2008 issue of the Register of Regulations. SCPD has the following observations.

First, in §5000, the definition of "DHSS" merits revision.

A. Paragraph 2 refers to "a managed care company ("MCO") under contract with DHSS to manage an operation of the Medicaid Program." The Division of Child Mental Health Services is a Medicaid MCO. It is not a "company". Moreover, SCPD lacks information on whether its status as an MCO is established by "contract", memorandum of understanding, or other document. DHSS should consider amending this section to accurately include the DCMHS.

B. Paragraph 1 refers to "financial assistance". This may be too narrow. The Delaware Code contemplates many forms of "public assistance". See Title 31 Del.C. §§501-502. DSS administers a variety of public assistance benefits, including job training and education. Compare 16 DE Admin Code §5304: "An opportunity for a hearing will be granted to any ...recipient who is aggrieved by any action of the Division of Social Services such as actions to ...assign Food Stamp Program recipients to a specific employment and training component." DSS is also involved in medical assistance. Apart from the Chronic Renal Disease Program, DSS is responsible for PASARR hearings. See 16 DE Admin Code §5304.1. Therefore, Par. 1 could be amended to refer to "economic, medical, vocational or child care subsidy assistance". Parenthetically, 16 DE Admin Code §5304 refers to "economic assistance" rather than "financial assistance". "Economic" is ostensibly a more encompassing term.

C. DDDS and DSAAPD are not mentioned in the definition of covered DHSS divisions. Both agencies administer some Medicaid waivers. The waivers authorize aggrieved applicants and participants to pursue a fair hearing. See, e.g. attached Appendix F-1:1 from ABI waiver.

D. The DLTCRP is not mentioned in the definition of covered DHSS divisions. Consistent with

Title 16 Del.C. §1121(18), residents of licensed long-term care facilities can request a DHSS hearing to contest an involuntary discharge. Pursuant to 16 DE Admin Code §5304.2, DSS processes such fair hearing requests involving nursing homes. However, the DLTCRP has been processing hearings for non-nursing homes with no regulations. See attached October, 2004 correspondence between DLP and DLTCRP. It would be preferable to clarify that such hearings are subject to the Title 16 Admin Code 5000 procedures and clarify if they are processed by DSS or the DLTCRP.

Second, §5405(4) categorically disallows the hearing officer “to assist either party in the presentation of the case”. Since DHSS representatives are professionals routinely involved in hearings, this disallowance disproportionately affects pro se applicants. This provision also violates federal Food Stamp regulations which recite as follows:

(p) Household rights during hearing. The household may not be familiar with the rules of order and it may be necessary to make particular efforts to arrive at the facts of the case in a way that makes the household feel most at ease.

7 C.F.R. §273.15(p). The courts have often imposed an expectation of some assistance to pro se applicants in presenting their case in administrative hearings. See, e.g. Reefer v. Barnhart, 326 F.3d 376, 380 (3d Cir. 2003); Livingston v. Califano, 614 F.2d 342, (3d Cir. 1980); and Dobrowolsky v. Califano, 606 F. 2d 403 (3d Cir. 1979).

Third, §5405(3)(b) changes the order of presentation. The current standard establishes a norm of DHSS presenting first unless the hearing officer exercises discretion to have the individual present first. The amendment requires the party with the burden of proof to proceed first and disallows any hearing officer discretion. This is highly objectionable. The hearing officer should be granted some discretion in establishing the order of presentation. Moreover, it would be preferable to retain the current approach in which the State normally presents first. This is the approach adopted in other administrative hearings. See, e.g. attached Department of Education hearing procedures under Title 14 Del.C. §3135. As a practical level, it may streamline the hearing to have the State present first. For example, if a pro se applicant has been denied eligibility for a program, it is logical to have DHSS present first on the program eligibility standards and specific reasons why the applicant does not meet the standards. If the applicant proceeds first, the applicant may not be clear on the standards and eligibility deficits. As a result, the presentation will be unfocused and protracted. Moreover, if the unsophisticated pro se applicant simply recites that he believes he is eligible, his appeal will be summarily denied for failure to prove all essential elements of the case with no presentation by the State based on §5405(3)c).

If the proposed changes to §5405(3)b) are retained, DHSS should amend the fourth sentence to read as follows:

The appellant or claimant is the moving party for actions related to initial ineligibility determinations, initial denials of claims or the failure to act upon a claim with reasonable promptness.

Council’s rationale is that any termination or discontinuation of assistance decision amounts to an “ineligibility determination” or “denial”.

Fourth, the amendment to §5405(3)d) is problematic. It recites:

If the ~~second~~ party has presented evidence, the ~~first~~ party may, in the discretion of the hearing office, present rebuttal evidence.

The words “second” and “first” should be retained for clarity. Otherwise, it is unclear which “party” is being referenced.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations or recommendations the proposed regulations.

cc: Ms. Elaine Archangelo
Governor’s Advisory Council for Exceptional Citizens
Developmental Disabilities Council

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